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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1182

G. RAYMOND ARNETT, as Director of the Department of Fish and Game of the State of California,

Plaintiff and Respondent,

vs.

5 GILL NETS, etc.,

Defendant,

RAYMOND MATTZ,

Intervenor and Petitioner.

Respondent's Reply Brief

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The Respondent's Reply Brief is submitted herewith in response to the U. S. Supreme Court Clerk's request for such a brief.

I.
STATEMENT OF THE FACTS

This is an action by the Director of the Department of Fish and Game for the State of California (hereinafter the "Director") to forfeit fish nets owned by the intervenor, Raymond Mattz, on grounds that the nets were used in violation of California's fishing laws. The intervenor claims that he is not subject to California's fishing laws by virtue of section 1162 of Title 18 of the United States Code. Under that section, California is given jurisdiction over all offenses committed by Indians within the

State, except (a) those committed in "Indian country," or (b) those falling within the protective ambit of a "Federal treaty, agreement or statute." "Indian country" is defined in section 1151 to include a "reservation."

The Superior Court in California held that the land on which the nets were seized was not "Indian country" within the meaning of section 1151, and on that basis ordered the forfeiture of the nets. The court did not reach the question of whether the intervenor's fishing activities were protected by a "Federal treaty, agreement or statute." The California Court of Appeal upheld the lower court's order, and, after the California Supreme Court denied the intervenor's petition for a hearing, the intervenor filed this petition for a writ of certiorari.

The intervenor claims that the area in which the nets were seized, which is now privately owned, constitutes a "reservation," and hence is "Indian country." The history of the area reveals otherwise. The nets were seized in what was formerly the Klamath River Reservation, a reservation established in 1855 to include an area one mile wide on each side of the Klamath River from its mouth to a point approximately 20 miles upstream. The reservation was terminated under legislation enacted in 1864. At approximately the same time, the Hoopa Valley Indian Reservation (hereinafter the "Hoopa reservation") was created to include a 12-mile square area on the upper Klamath River. An executive order was issued in 1891 extending this reservation to include an area one mile wide on each side of the Klamath River from its mouth to the Hoopa reservation, a distance of roughly 40 miles. This extension, of course, included the old Klamath River Reservation. But this latter reservation was again terminated, we believe, by a congressional enactment in the following year, 1892. 27 Stat. 52.

The 1892 enactment decreed that lands in "what was [the] Klamath River Reservation" were to be opened for public purchase. Specifically, the lands were to be subject to entry, settlement and purchase under the homestead laws and the laws authorizing the sale of mineral, stone and timber lands. A proviso established the right of Indians residing on the lands to apply for allotments under the General Allotment Act of 1887. Proceeds from the sale of the lands were to be used for the maintenance and education of Indians then residing on the land, a provision which was amended in 1917 to expand the Indian benefits thereunder. 39 Stat. 969, 976.

II.

THE PENDING MATTER IS DISTINGUISHABLE FROM THE MATTER BEFORE THE SEYMOUR COURT RELATING TO THE 1906 ACT AFFECTING THE SOUTHERN HALF OF THE COLVILLE RESERVATION.

The intervenor asserts that the 1892 enactment did not have the effect of terminating the reservation status of the old Klamath River Reservation. The intervenor principally relies on the decision of the United States Supreme Court in *Seymour v. Superintendent,* 368 U.S. 351 (1962). In that case, Congress had passed legislation in 1892 which, according to the Court, terminated the reservation status of the northern half of the Colville Indian Reservation (hereinafter the "Colville reservation") in Washington. 27 Stat. 62. The southern half of the reservation was expressly unaffected by the legislation. In 1906, Congress passed additional legislation which (1) gave allotments to Indians "belonging to or having tribal relations on" the southern half of the diminished reservation, (2) provided that the "surplus lands" thereon were to be opened to settlement and entry under the homestead laws and sold under the mining laws, and (3) provided that the proceeds from the sale of such lands were to be used for the benefit of the Indians residing on the reservation.

The *Seymour* Court held that the 1906 enactment did not terminate the reservation status of the southern half of the diminished Colville reservation. The main reason for this conclusion, the Court declared, is that the language of the enactment, particularly the repeated references to the "diminished Colville Indian Reservation," made it clear that Congress intended for the diminished reservation to continue in effect. No similar language is contained in the 1892 enactment which, we believe, terminated the old Klamath River Reservation. For instance, the 1906 legislation directs that proceeds from land sales are to go to Indians on the "Colville Indian Reservation," but the 1892 legislation concerning the old Klamath River Reservation directs that similar proceeds are to go to Indians residing on the "lands" affected by the legislation. In fact, the 1892 enactment specifically refers to "lands in what *was* [the] Klamath River Reservation," thus directly implying that its reservation status is to cease. [Emphasis added.]

The *Seymour* Court also relied upon less persuasive facts to support its conclusion. The Court noted that the proceeds of the land sales were to be deposited in the U. S. Treasury for the use of the Indians remaining on the reservation. This procedure is essentially similar to the disposition of such proceeds under the 1892 enactment relating to the old Klamath River Reservation. But it is also largely similar to the procedure for disposing of such proceeds under the 1892 enactment terminating the reservation status of the northern half of the Colville reservation. This enactment provided that such proceeds should be set aside in the U. S. Treasury, and that, although Congress could ultimately appropriate them for the public use, the proceeds in the meantime were to be used for the benefit of the Indians. Since the *Seymour* Court held that this latter enactment effectively dissolved the northern

half of the Colville reservation, it is apparent that the use of such proceeds for the Indians' benefit is a factor that, although subject to consideration, is not of critical or even substantial significance.

The *Seymour* Court also noted that, beginning 10 years after the 1906 enactment concerning the Colville reservation, in 1916, legislation enacted by Congress frequently referred to the diminished Colville reservation in a manner that suggests that the reservation was to continue in effect.[1] But the only congressional reference cited by the intervenor relating to the Klamath River Reservation consists of a 1958 enactment. See 72 Stat. 121.[2] Such a congressional utterance has little bearing on the composition of the congressional mind 66 years earlier. In fact, this Court has recently indicated that congressional action or inaction is of little significance in ascertaining the congressional intent behind an earlier enactment, particularly where the enactment is remote in time. See *United States v. Wise*, 370 U.S. 405 (1962).

III.

THE PENDING MATTER CLOSELY RESEMBLES THE MATTER BEFORE THE SEYMOUR COURT RELATING TO THE 1892 ACT AFFECTING THE NORTHERN HALF OF THE COLVILLE RESERVATION.

Perhaps the distinction between the pending matter and the matter before the *Seymour* Court can be illuminated more clearly by focusing on the 1892 enactment concerning the northern half of the Colville reservation. That enactment, which the *Seymour* Court held to have effec-

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1. The Court cited eight such references. See 368 U.S. at p. 356, n. 12.

2. The intervenor also cited a 1942 act that alluded to allotments on the "Klamath River Reservation." 25 U.S.C.A. § 348a. However, the context shows that the allusion was merely intended to identify the allotments, not to otherwise suggest that the land on which the allotments were located was a reservation.

tively discontinued the reservation on the northern half, is virtually identical to the 1892 enactment concerning the old Klamath River Reservation. Both provided for entry and settlement of unallotted lands under the homestead laws. Although the enactment concerning the northern half of the Colville reservation contained additional language that such land was "restored to the public domain," the effect of both enactments was identical; under the homestead laws, land was similarly restored to the public domain under the enactment concerning the old Klamath River Reservation. Both pieces of legislation also provided that the proceeds from the disposition of these lands would be used for the Indians' benefit, although as noted earlier the Colville legislation reserved the right of Congress to eventually use these proceeds for the public benefit. Both enactments provided that Indians "residing" on the respective lands could secure allotments under the General Allotment Act of 1887, thus authorizing the federal government to act as trustee for lands which were eventually to be turned over to the Indians in fee simple. By way of contrast, the 1906 enactment concerning the southern half of the Colville reservation made allotments available to any Indian "belonging to or having tribal relations" on the reservation, not just to those residing on the reservation.

Moreover, the 1906 enactment set aside additional property for administrative, educational and religious purposes of the Indians, thus suggesting that some of the traditional functions of a reservation were expected to continue. Neither of the 1892 enactments contained similar provisions. Indeed, both 1892 enactments were, of course, passed by the same Congress, the Fifty-Ninth, within two weeks of each other. That the same Congress enacted virtually identical provisions, employing similar language,

is strongly persuasive that it intended to achieve a similar result, which in this case would be the termination of both reservations.

It may be asked, why did the *Seymour* Court conclude that the 1906 enactment affecting the southern half of the Colville reservation did not similarly terminate that portion of the reservation? The answer, it clearly appears, is that the 1906 legislation contained language amply indicating that the reservation was expected to continue in effect. However, no such language is found in the 1892 enactment concerning the old Klamath River Reservation, and indeed the enactment referred to the reservation in the past tense and thus amply indicated that the reservation was not expected to survive the enactment.

The practical effect of the 1892 legislation was to bring to a halt the traditional tribal cohesion on the old Klamath River Reservation. The legislation opened up the old reservation to a flood of non-Indian settlers under the homestead laws. Certainly the area lost its resemblance to the neighboring extension located on the upper 20 miles of the Klamath River, where non-Indian settlers continued to be excluded and where the land continued to be set aside for the Indians. Since the traditional functions of a reservation continued in one area but not the other, it is difficult to believe that Congress intended that both areas would continue to be similarly regarded as reservations. The California Court of Appeal recognized this proposition in 1966, when it declared in dictum that the old reservation "for all practical purposes, almost immediately lost its identity as part of the Hoopa Valley Reservation." *Elser v. Gill Net Number One,* 246 Cal.App.2d 30, 34 (1966). Surely this was the logical consequence of the 1892 enactment that Congress expected.

CONCLUSION

The congressional intent behind the 1892 enactment was to discontinue the historic functions of the old Klamath River Reservation, in the same manner that an act of the same year discontinued the functions of the northern half of the Colville reservation. The Indians were to be protected by being allowed to secure individual allotments, and to receive the benefit of the proceeds from the sale of the remaining land. But the reservation, operationally and legally, ceased to exist.

California has no interest in whittling away the rights of Indians which are secured under federal law. But California has the constitutional obligation to apply its laws uniformly to all persons in its jurisdiction, in the absence of conflicting federal law, and these laws must be applied to Indians as to others. In recognition of the special cultural and economic problems of Indians now residing on the land of the former Klamath River Reservation, California has relaxed its fishing standards applicable to such Indians. See California Fish and Game Code § 7155. But to ignore these standards altogether, as to the Indians or to others, would be to jeopardize California's efforts to conserve the vital and irreplaceable fishery resource in the Klamath River. The Court should deny the intervenor's petition.

Dated: June 21, 1972

Respectfully submitted,

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